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2 Had before The Honorable Cheryl A. Eifert, United
3 States Magistrate Judge, United States District Court, for
4 the Southern District of West Virginia, at Huntington, via
5 teleconference, on February 11, 2015, as follows:

6 THE COURT: Hello.

7 UNIDENTIFIED SPEAKER: Good afternoon, Your Honor.

8 THE COURT: All right, we don't have a court
9 reporter with us today --

10 COURT REPORTER: Excuse me, Judge Eifert, this is
11 Cathy.

12 THE COURT: Oh, hi, Cathy, how are?

13 COURT REPORTER: I am fine, thank you. I just
14 joined the teleconference.

15 THE COURT: All right, well let me go ahead then
16 and just state that we are here in the Ethicon Pelvic Repair
17 Systems product liability litigation, MDL Number
18 2:12-MD-02327.

19 We are here on a motion filed by Ethicon. And I'm
20 going to ask counsel to go ahead and note their appearance
21 again since Cathy has just joined us, and I'll also ask you
22 to please state your name before you speak so she can get a
23 clear transcript.

24 So if plaintiffs would go first and note their
25 appearance.

1 MR. MATTHEWS: This is David Matthews from
2 Houston, Texas, for plaintiffs.

3 MR. AYLSTOCK: Good afternoon, Judge. This is
4 Bryan Aylstock for the plaintiffs.

5 MS. BAGGETT: Renee Baggett for the plaintiffs.

6 THE COURT: All right. Is that all for the
7 plaintiffs then?

8 (Yes, Your Honor.)

9 THE COURT: All right. Then on behalf of Ethicon?

10 MR. BERNARDO: Good afternoon, Your Honor, it's
11 Richard Bernardo for Ethicon.

12 MR. WATSON: Ben Watson for Ethicon.

13 MR. KINSEL: J. F. Kinsel, K-I-N-S-E-L, for
14 Ethicon.

15 THE COURT: Very good. All right. And I'll ask
16 you if you are on a landline, to please use the receiver and
17 not the speakerphone if it is possible since we do sometimes
18 have trouble picking everybody up.

19 Now, this is, as I said, a motion filed by Ethicon for
20 an order directing parties to coordinate resolution of the
21 discovery disputes between state and federal courts. I have
22 looked at the motion. I'll ask Ethicon to speak first about
23 it. I'm not really certain I understand how I can help you.
24 So why don't you explain to me what it is you think that I
25 can do.

1 MR. BERNARDO: Thank you, Your Honor. This is
2 Richard Bernardo for Ethicon. And as you stated, we're
3 asking for your assistance, Judge Eifert, in coordinating
4 between the MDL and a state court in Texas to address what
5 is a growing and significant privilege dispute that has
6 arisen in Texas. And perhaps it would be helpful before I
7 get to the substance of what we're asking for to give some
8 context and background.

9 Over the last several years, Ethicon has been complying
10 with its discovery obligations in pelvic mesh litigation in
11 the MDL and in the individual state cases by making sure
12 that plaintiffs get the same documents both in the MDL and
13 in the state court. We've been producing documents in
14 installments first in the MDL and then a duplicate set to
15 the state cases. We do the same thing with respect to the
16 privilege logs. We create it for the MDLs and we serve it
17 in the MDLs and then we make it available in the state
18 cases. We've adopted this global production approach in the
19 spirit of coordination and fairness, so essentially
20 everything is available to all plaintiffs.

21 As to privilege, in particular, for the last couple of
22 years, Your Honor, it has been an informal procedure in the
23 MDL to address privilege challenges by plaintiffs.
24 Obviously in a case like this where I think the count is up
25 to about 20 million pages of documents, the privilege log is

1 enormous. Therefore, the plaintiffs in the MDL have been
2 very good about identifying groups of documents on a
3 periodic basis that are of interest to them based on the
4 description of the logs, and after they identify them, we go
5 back and we look at our designations, we try and whittle
6 down ones where we might recognize, for example, if there
7 could be a disagreement among courts as to the privilege
8 status, or where we otherwise reconsider a designation.

9 We meet and confer with plaintiffs with an eye toward
10 narrowing the scope of any dispute that might have to get
11 raised with your Your Honor. And I can say the process has
12 been working very well. To date, we've responded to more
13 than 30 sets of challenges pertaining to more than 2,000
14 documents in the MDL process, and I don't believe we've had
15 to raise any issues with Your Honor yet.

16 I think that demonstrates a very successful and
17 cooperative process among the parties in the MDL. As I
18 mentioned, this log is also sent to individual state cases
19 that are not part of the MDL. And late last year we
20 received from a plaintiff's lawyer in a state case a
21 challenge to approximately 1,500 privileged documents from
22 the global production. It was the Caviness (phonetic) case
23 in Texas.

24 And notably, the challenge in the Texas case was made
25 by one of the plaintiff's counsel in Texas who is also one

1 of the counsel appointed by this Court to serve on the MDL
2 Steering Committee.

3 Ethicon was troubled by what we perceive to be an
4 obvious attempt to sidestep the MDL privilege process and
5 create a separate duplicative process in the state court
6 case. We think this is inconsistent with Ethicon's spirit
7 of cooperation and coordination regarding document discovery
8 and we think will inevitably lead to increased time and
9 resources by Ethicon to handle these challenges and more
10 importantly it will inevitably lead to inconsistent rulings.

11 We asked plaintiffs' counsel to raise their challenge
12 as part of the MDL process, but they wouldn't agree to do
13 that, so we struck what we thought was a fair compromise.
14 Despite our disagreement with proceeding both in the MDL in
15 Texas, we agreed that we would address their challenges on a
16 separate track and on an accelerated basis if they for their
17 part would agree to work with us to narrow the issues and
18 could come up with a coordinated procedure that would
19 involve a joint adjudication on these documents by Your
20 Honor and a Special Master in Texas so we can have a jointly
21 collaborated ruling that could apply to the MDL and apply to
22 Texas for all the documents that are obviously produced in
23 both cases.

24 Now, we reached this agreement two days before
25 Christmas, and I can represent that Ethicon's counsel worked

1 very diligently through the holidays to get -- go through
2 every one of the 1,500 documents and eliminate as many as
3 possible by the beginning of January and produce any
4 documents that we withdrew our claims on immediately.

5 Folks spent the holidays and whittled away 1,100
6 documents that we were able to identify as duplicitous; in
7 other words, several times you'll have a piece of the same
8 E-mail thread that appears in several different threads and
9 folks compared and, you know, said, okay, this one is
10 identical to a thread that is also being claimed as
11 privileged, so we can eliminate these from the discussions,
12 narrow the issues. And through that process, we turned that
13 list into just under 400 documents.

14 Then we took further steps, thinking, again, that this
15 was a finite set of 1,500 that would be the challenge, and
16 we tried to eliminate more documents based upon a very
17 conservative read of the law and got rid of documents for
18 which we found there was a disagreement among the courts.
19 We did all of this because we understood plaintiffs agreed
20 to meet and confer with us to discuss coordination and
21 narrow the issues.

22 Now here we are, it's a month later, the middle of
23 February -- more than a month, and as of this date
24 plaintiffs have not met and conferred with us. More
25 importantly, they've withdrawn their agreements to

1 coordinate resolution with the MDL case, and they've
2 indicated that they plan to challenge the entirety of the
3 logs that Ethicon has submitted in the MDL in the Texas
4 proceeding alone. In fact, we had to go to the Texas judge
5 late last week and ask him to order the plaintiffs to meet
6 and confer with us. And, in fact, I'm speaking to you from
7 Dallas, Your Honor, because I'm here with one of my
8 colleagues so we can finally sit down with them tomorrow.

9 Now, I apologize for that long background, but I think
10 it's important to provide you with a context of what is
11 going on here. So what are we asking for?

12 We'd really like Your Honor to tell a member of the
13 Steering Committee in the MDL that he shouldn't be
14 circumventing the MDL discovery and going to another court
15 where they expect they might get a more favorable ruling.
16 It's not right, it's not fair, especially after we reached
17 an agreement.

18 At the very least, Your Honor, we're asking for this
19 Court to work with the parties and the court in Texas to
20 come up with a coordinated procedure for resolving the
21 privilege dispute that includes the input of this Court as
22 well as the Texas court. You can imagine what would happen
23 if every court in the individual state cases that aren't
24 part of the MDL tried to do what is being done here.

25 One of the very purposes of an MDL is to eliminate

1 duplicative discovery, which obviously results in
2 unnecessary expense, delay, and works against both sides.

3 Naturally, there's some cases that are not removable;
4 therefore, we think it's especially important for federal
5 coordination with the state in discovery issues, as it
6 serves the interests of all parties. This idea is not only
7 recognized by the manual for complex litigation and numerous
8 other commentators in cases, but it's also recognized by
9 this Court. In fact, PTO Number 4, which we provide a copy
10 of in our brief in the MDL is largely about coordination
11 and talks about the appointment of a steering committee to
12 coordinate, not to avoid coordination.

13 Judge Goodwin has on occasion also commented that the
14 lawyers in the state cases need to be considerate of the MDL
15 process. Our motion cites to a number of precedence in
16 other MDLs -- I won't take the time to repeat them all,
17 but I'll highlight, for example, in the Bextra and the
18 Celebrex MDLs, where the parties appointed a joint Special
19 Master so they could adjudicate issues that arise both in
20 the state and cases in the MDL.

21 In the Yaz and Yasmin cases, Judge Herndon also had a
22 very detailed discovery protocol that required disputes in
23 the state cases to get copied to him so he can consult with
24 the various state court judges and resolve disputes.

25 And we think a coordinated approach would work well

1 here, especially given the breadth and scope of what we
2 understand is coming defendants' way in terms of challenges.

3 So we respectfully request, Judge Eifert, that this
4 Court essentially order the members of the Steering
5 Committee on the MDL to work with the MDL and not abandon
6 the process and just work exclusively in Texas.

7 We have a filing deadline that is now upon us in Texas
8 for a week from Monday to submit our substantiation of our
9 privilege claims, and we'd very much like to file that in
10 the MDL, as well, again, so we can seek coordination.

11 Thank you, Your Honor.

12 THE COURT: All right. Who would like to speak on
13 behalf of the plaintiffs'?

14 MR. AYLSTOCK: Judge, this is Bryan Aylstock.
15 Dave Matthews is involved in making the case in Texas; I am
16 not. (Inaudible.) But given the very lengthy colloquy of
17 Mr. Watson -- or, I'm sorry, Mr. Bernardo, that I think is a
18 little misleading, can I comment generally on the MDL
19 process and how that's been going, and then turn it over to
20 Mr. Matthews?

21 THE COURT: Certainly.

22 MR. AYLSTOCK: Well, Mr. Bernardo made comments
23 about duplicative discovery and end-runs and agreements to
24 coordinate. There is a process in the MDL that challenge
25 privileged documents, as you are aware. A couple of

1 thousand have been redesignated because of that. But,
2 frankly, we have been so focused on getting what we needed
3 to get for these trials, we have not undertaken any sort of
4 an overall review of the privilege log in any great detail,
5 and based upon the challenges we have made, a large number
6 of them ended up not being privileged and shouldn't have
7 been on the log in the first place.

8 There's tens of thousands I think on the privilege log,
9 Mr. Bernardo can correct me, but, this is not a case where
10 anybody, to my knowledge, is seeking to duplicate or end-run
11 anything before Your Honor or Judge Goodwin. None of these
12 documents, to my knowledge, have even been challenged in the
13 MDL, nor is there a motion pending. So I don't see how this
14 is duplicative at all of what the MDL is doing.

15 And with regard to coordination, I mean, I do know Mr.
16 Matthews very well, and I don't think there's an issue with
17 regard to some rogue (inaudible) team member trying to do
18 things that undermine or circumvent some order or motion
19 pending in its MDL. I think it's simply a situation where
20 the MDL, you have lawyers in the middle of trial right now
21 and more coming up. We just haven't teed this up. I don't
22 even know what documents they are, and I don't know what law
23 applies, and I'm not involved in the Texas case, but to
24 suggest that somehow somebody is trying to duplicate
25 discovery or circumvent some pending motion with this Court

1 I think is a bit too far.

2 THE COURT: All right. Then is it Mr. Matthews
3 who is going to respond to the motion?

4 MR. MATTHEWS: Yes, Your Honor. David Matthews
5 for the plaintiff. I do think that our response is due on
6 Monday. We are, of course, still putting our written
7 response together. We were hoping to have our
8 meet-and-confer tomorrow at 10 o'clock in Dallas, and to
9 incorporate what happens during that meeting to also
10 incorporate in our response.

11 As a little bit of background in the case, my firm and
12 the Freese law firm, we -- Tim Goss and David Matthews, we
13 are both on the Plaintiffs' Steering Committee. Outside of
14 that, we have also tried a TVT-O case in Dallas, Texas, the
15 Batiste case. And then an Obtryx case, also in Dallas, also
16 in Judge Molberg's court. And Judge Molberg is the
17 coordinating judge in Dallas District Court. Because of
18 that reason, the fact that we have had quite a bit of
19 experience in mesh cases in the past, in fact, Mr. Goss is
20 in trial right now, in Bakersfield, California, one of the
21 reasons he can't be on this call, and that's also against
22 Ethicon. They're in about the third week of trial. So
23 we've had a great deal of experience with mesh cases.

24 I bring that up, because we were contacted by a lawyer,
25 Bill Blankenship, whose -- who is the lawyer that has this

1 case called the Caviness case in Dallas County. This is his
2 case. He contacted us for help for, as you might suspect, a
3 variety of reasons, one, being experience; two, being
4 experts; and three, being we have knowledge about the mesh
5 products.

6 Now, this particular product is a Prosima product at
7 issue. This entire privilege log came about back in
8 November 7, 2014, when Bill Blankenship contacted Carol
9 Traylor, who is lawyer for Ethicon, at Cantey Hanger. And
10 he wanted to know and requested of her our local Texas Rule
11 193, the identification of withheld material. And that
12 started this whole thing.

13 Upon that -- and in addition to that, we had trial
14 setting in April, so, he was very specific, and then we
15 assisted, because we've had, you know, a great deal of
16 contact, of course, with Ethicon over the years. So we have
17 certainly not tried to circumvent any duties.

18 I've been on over ten MDL PFCs over my career, and I
19 certainly have tried in every way perceivable -- this is not
20 vast circumvention. In fact, we have specifically looked
21 for documents pertaining to the Prosima product. This
22 started, and we've had, at the last count, over 18
23 discussions with Ethicon about this very issue. And we
24 boiled down some 1,500 document requests down to 174
25 documents.

1 We are meeting tomorrow at 10 o'clock. The judge has
2 ordered us to meet and confer one last time before hearing.
3 This is something -- obviously states have different
4 standards interpreting privilege law. Judge Molberg is
5 directing us to meet and then we'll set a hearing on this
6 very privilege log issue pertaining to the 174 documents.
7 We may be able to decrease that after our meeting tomorrow.
8 We plan on meeting as long as we need to, to go over each
9 and every document. Obviously, we don't have the documents,
10 but we have their log list, which has a description of the
11 document, the author, who it's from, who it's to, and then
12 the privilege narrative.

13 So we plan on following the Court's order. This is Mr.
14 Blankenship's case. We continue to assist. This has never
15 been brought before the federal MDL where Your Honor
16 presides. And we're doing as directed by the Court.

17 THE COURT: I guess -- I guess where I'm a bit
18 confused, I'm not really certain what it is that Ethicon
19 thinks that I can do . Maybe I'm not understanding the fact
20 scenario, but the way I read the motion, as I understand it,
21 in Texas, in a pending state case, the plaintiffs are
22 challenging the privilege designation of certain documents.
23 And that matter is now pending in front of the judge in the
24 Texas state court. And the judge apparently is going to
25 have some sort of a hearing on that, and perhaps even

1 looking at these documents in camera.

2 UNIDENTIFIED SPEAKER: That's correct, Your Honor.

3 THE COURT: I don't quite understand what
4 coordination I can really do about that. I mean, I really
5 don't understand what it is I can do. I can't order -- I
6 can't -- I don't really feel that I have any authority to
7 tell these lawyers who have a case pending in the state that
8 they're not allowed to ask a judge in another case to make
9 rulings on matters simply because those rulings might affect
10 the MDLs. I do agree with you, I think coordination is very
11 important.

12 There's no motion pending in front of me on these
13 documents, so I don't -- I don't see that there's a
14 coordination issue in that regard. I could see it more as a
15 coordination issue if I had the very same motion currently
16 pending in front of me, then I could see where it would be
17 important for me to at least have some contact with the
18 judge in Texas and make sure that we're on the same page in
19 some regard. But I'm not really certain what, you know,
20 Ethicon thinks I can do about this .

21 I mean, the judge in Texas needs to make decisions in
22 the Texas case. And I don't really know what I can do or
23 would want to do about that. I guess I'm just really not
24 understanding what it is you want me to do. I mean, I hear
25 you say you want me to order the lawyers in the MDL to

1 coordinate. But coordinate what?

2 I think there's already a motion pending in front of
3 the judge in Texas. So what am I supposed to coordinate?

4 MR. BERNARDO: Your Honor, this is Richard
5 Bernardo. Coordinate the resolution of issues that have
6 broad-sweeping applicability. There are a couple of things
7 that were said that I feel the need to correct that are
8 important.

9 First of all, the not duplicative. There are indeed
10 documents that are part of this challenge that overlap the
11 very same documents that have been challenged in the MDLs,
12 so the process is duplicative. And contrary to Mr.
13 Matthews' statements, we've been told that after they
14 challenge these 174, they're going to go after all of the
15 documents on Ethicon's privilege log, which creates an
16 unworkable situation.

17 If every state court proceeding in which Ethicon files
18 this privilege log entertained challenges and Ethicon has to
19 defend its privileged documents in each of these cases, it
20 would totally consume all the parties' time.

21 Mr. Aylstock says that the MDL doesn't have enough time
22 to address privilege issues. Well, there are a lot of
23 lawyers that were appointed to the plaintiffs various
24 committees and they ought to be making the time to ensure
25 that the very same documents that are being produced in the

1 spirit of cooperation in both the MDL and the state cases
2 are resolved with respect to privilege in a harmonious
3 manner that takes into account Your Honor's input as to
4 privilege.

5 And one thing we could suggest, Your Honor, is to reach
6 out to Texas and ask if the MDL can participate in the
7 review of the same documents and issue rulings with respect
8 to the same documents so there could at least be a
9 coordinated effort between the cases. That's been done in
10 other MDLs as well.

11 We really feel like this is an obvious attempt to do an
12 end-run around the very core of the MDLs' purpose, which is
13 to facilitate coordination.

14 So, as I said, I think there are a number of things
15 that could be done. The plaintiffs can be ordered to
16 address the same documents in the MDL that are being
17 addressed in the Texas case, or to initiate the same
18 challenges so they could be adjudicated in a consistent
19 manner.

20 THE COURT: Maybe going forward -- perhaps going
21 forward something like that could be done. I don't know
22 what can be done right now about the case pending in Texas,
23 because it sounds like there's already a motion in front of
24 the judge in Texas. And there is no motion in front of me.
25 And I don't -- what I'm trying to say is, I don't have any

1 real authority to call up the judge in Texas and say, I
2 don't want you to do anything. You know, I want to also be
3 involved in your decision, because, you know, frankly, when
4 you look at federal law on privilege, whether or not a
5 privilege exists is generally going to be determined by
6 state law. Whether the privilege is waived is determined by
7 federal law in the federal court, but the existence of the
8 privilege is a matter of state law. So it would be the --
9 the person who's not the expert telling the person who is
10 the expert, I don't want you to make a decision until I can
11 participate with you in that decision.

12 And I don't know that that would be a comfortable
13 position for me to be in.

14 Now, going forward, I understand what you're saying.
15 Perhaps what I can do is say to the MDL lawyers, when you're
16 going to file a motion like this, and you're going to bring
17 an issue like this up in a state case, you also need to file
18 that same motion here in the MDL so that there can be some
19 sort of coordination, so that we're all on the same page and
20 all of the -- but ultimately, I don't, I really don't have
21 any control over what the judge will do in the state
22 jurisdiction.

23 MR. BERNARDO: Judge Eifert, this is Rich Bernardo
24 again. We would be appreciative if Your Honor would
25 order -- issue such a ruling, because, in addition to these

1 174 documents that are now at issue, we have the concern
2 that we're going to be litigating from now until kingdom
3 come the remaining documents on the privilege log, some of
4 which we've already worked with the leadership in the MDL to
5 discuss and meet and confer on.

6 So we would be appreciative if Your Honor would do that
7 on a forward-going basis.

8 As to the law, Texas law follows Section 139 of the
9 restatement on privilege, which basically looks to the
10 statement of the most significant relationship with respect
11 to a communication, which is going to be in these documents
12 in New Jersey (inaudible) given the communication, so both
13 the federal court and the Texas court would be looking to
14 another state law, so you'd be on equal footing, if you
15 will, but --

16 THE COURT: Mr. Bernardo, I'm sorry, to interrupt,
17 but does everyone agree that it's going to be New Jersey law
18 that will govern?

19 UNIDENTIFIED SPEAKER: We haven't met and
20 conferred, Your Honor, so I'm not prepared to say there's
21 any agreement. Our papers that we will be submitting will
22 set forth our position with respect to the law, but I can't
23 say that the parties agree on that.

24 MR. AYLSTOCK: And frankly, Judge, I have not --
25 this is Bryan Aylstock -- I haven't looked at it. I will

1 say that I think Mr. Matthews makes an excellent point in
2 that this is a Prosima case proceeding in Texas. The MDL --
3 we don't have a Prosima case even on the radar at this
4 point, nor have we really done much Prosima discovery. And,
5 you know, I'm happy to coordinate with Mr. Matthews. He and
6 I have known each other for a very long time, but we're --
7 we're paddling upstream as fast as we can. We have the
8 Bellew case; we have another TVT case set, and to order us
9 to file and then argue and then be prepared to brief and
10 everything else a bunch of documents that may or may not be
11 relevant to the issue at hand in the MDL in a state that we
12 -- or, at least, speaking for myself, I have nothing to do
13 with, I think is a bridge too far.

14 THE COURT: Well, I think for me, the first issue
15 is this whole issue about what law is going to govern. I
16 mean, just in thinking, I haven't -- I have really not
17 thought this through. I just -- I've just looked at your
18 motion, and I saw where there was to be a February 17th
19 hearing in front of the judge in Texas, and I thought to
20 myself, well, we ought to at least talk about this on the
21 phone so I can get some idea of what it is that you want.

22 But in thinking this through, you know, hopefully
23 everyone will agree that it's New Jersey law that governs,
24 because if you're going to have to go from state to state to
25 state to state and figure out what the privilege law would

1 be in each one of those states, that will be a nightmare in
2 and of itself. I mean, that would be an absolute nightmare.
3 So, you know, that is one thing that I think would be nice
4 to get settled.

5 And I think if that is settled, then I could see where
6 coordination with the MDL would make a lot more sense.

7 As far as the Prosima issue, Mr. Aylstock, they're
8 saying in their brief that a lot of these documents don't
9 concern just that device; that these are documents that sort
10 of are across-the-board documents. So they are documents
11 that would impact issues in the MDL. So I'm not so worried
12 about that, the device so much as -- what I can't get my
13 mind around is do I really want to be involved in each state
14 court, trying to decide whether a particular document is
15 privileged or not under their state law, which hopefully
16 that is not going to be the end result. And, you know, I
17 don't want to do that, obviously, for many reasons. But --

18 MR. BERNARDO: And, Your Honor, Rich Bernardo --

19 THE COURT: I'm just trying to figure out what the
20 practical way to handle this is.

21 MR. BERNARDO: Your Honor, Rich Bernardo again.
22 To the Prosima point, I must confess a little bit of
23 confusion, because having been through these documents,
24 they're not Prosima documents. Maybe that was the intent of
25 searches, but they're documents of a general nature that

1 apply in many respects to all products. But as to the law
2 issue, the very scenario you were talking about where going
3 from one state to the next is exactly what we're trying to
4 avoid and exactly what we think the MDL could hopefully
5 avoid by looking at the issue of the choice of law and
6 issuing a ruling that other state courts might -- maybe they
7 disagree with it, but at least there's a ruling by the Court
8 that is adjudicating the claims with respect to tens of
9 thousands of these plaintiffs and speaking to the choice of
10 law issue. And we would be happy to make a submission or an
11 application to this Court to try and sort through that issue
12 if that would be appropriate.

13 THE COURT: I think that would be a place to
14 start, as, again, I don't think there's much I can do about
15 the issue currently pending in Texas. I mean, if there's
16 already a motion pending in front of the judge there, I
17 don't know what I can do about that. But I do think going
18 forward, I think the first issue would be to figure out if
19 it is going to all be determined by New Jersey law. And I
20 don't even know whether you have to do -- what kind of
21 analysis you would have to do to figure out the choice of
22 law. That's even going to vary from state to state. I
23 don't know, because I haven't given it enough thought.

24 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock
25 again. Again, I'm reaching way back into my memory banks,

1 but I do believe the issue as you started this conference
2 with is the issue of privilege is determined by state law,
3 and state law will use their each individual choice of law
4 determination. So even if Texas would apply New Jersey law,
5 maybe most states do under the same section of the
6 restatement, but I think there is some variance and
7 different judges can interpret it differently. You know, I
8 think that this is a limited issue at this point.

9 The judge down there obviously has it teed up and, you
10 know, frankly, I'm -- I'm extremely busy right now trying to
11 prepare for not just Ethicon trials but a lot of other
12 things, and given that this isn't an MDL issue, and we've
13 focused on many other things, I would not want to take on
14 another brief writing job two weeks before trial.

15 THE COURT: Well, I do think that this is an MDL
16 issue. This is a huge issue, a huge and confusing issue.
17 And it could be an absolute nightmare to have. Because what
18 happens, Mr. Aylstock, is if one court (inaudible) -- you
19 know, says the document is not privileged, then suddenly
20 it's out there and it's -- even if I would think it was
21 privileged, now it's no longer privileged. I mean it could
22 just be an absolute nightmare. So I think it is something
23 that we'd better look at now. I'm not saying you have to
24 drop everything and do this today. But I think it's
25 something we need to get -- we need to get it on our radar

1 and start doing the briefing before there are other courts
2 out there that start one by one releasing documents. I do
3 think it's a huge issue. And, frankly, it's one I hadn't
4 thought of.

5 I guess this has come up in the context of discovery,
6 but, you know, it's an issue that's going to -- it's going
7 to be across-the-board a huge issue. So I do think it's
8 something that Ethicon ought to raise in the MDL. I don't
9 know how you would raise it. I don't know what you would
10 call your motion. You know, I'm sure you can be creative
11 and think of something. I don't know if it's a motion for
12 protective order; I don't know what you would call it. But
13 I think that the issue needs to be brought to this Court and
14 there needs to be some determination made of whether it's
15 going to be done on a state-by-state basis, or whether there
16 is going to be one law that applies.

17 And if there is one law that applies, then I feel much
18 more comfortable saying, yes, we need to coordinate this,
19 and there needs to be some sort of process put in place
20 where the attorneys are all on the same page, and they're
21 helping me coordinate with the other judges out there that
22 are considering the issues so that I at least know who's got
23 the motions pending so I can make some contact with them and
24 say, hey, are you willing to work with me, and what can we
25 do to resolve these issues together. I would like to be

1 able to do that, because I do think it's going to affect all
2 of us. And I'm certainly not territorial about these
3 things, but I'd like to at least know what's going on.

4 So I do think Ethicon should bring up the issue.

5 MR. BERNARDO: Your Honor, this is Rich Bernardo.

6 THE COURT: Yes.

7 MR. BERNARDO: First, thank you. We think it
8 would be helpful, and we will initiate doing that to work
9 with the leadership of the MDL to try and come up with a
10 procedure, because I also think, and based upon my
11 experience and experiences in other large MDLs, when the MDL
12 court addresses privilege issues, that has, for lack of
13 better description, a kind of deterrent effect on lawyers
14 trying to form shop. I would dare say, if there had been a
15 challenge that had been adjudicated through the MDL and
16 decisions rendered, that lawyers probably wouldn't be trying
17 to take the privilege log and bring it to a state court and
18 do all the work in the state court. I think that's what's
19 going on right now. But I think that a coordinated process
20 would be very helpful, and we will be creative in trying to
21 come up with an application to Your Honor.

22 I would also say in terms of timing with respect to the
23 present motion, one of the reasons we went to Judge Molberg
24 last week -- and Mr. Kinsel here with me is the one from
25 Texas who went to Judge Molberg -- was to try and put the

1 Texas motion on hold for at least some time for us to be
2 able to talk to you and meet and confer with plaintiffs.
3 Because we had all along been expecting that this was going
4 to be a coordinated effort, but, at the last minute,
5 plaintiffs changed their minds for reasons maybe I'll find
6 out tomorrow when we meet with them.

7 But the hearing in Texas on this motion is not on the
8 17th. It hasn't been set yet. We're ordered to submit our
9 papers in the Texas court on -- Ben, help me here -- on the
10 ten days -- I think it's a week from next Monday. And one
11 possibility, Your Honor, is, may we submit the same
12 submission which has a brief, a legal brief on the choice of
13 law components, as well as a document-by-document analysis
14 of the 174 documents at issue to the MDL court concurrently
15 with the Texas court? I mean that's one way that we could
16 start to establish a going-forward procedure.

17 THE COURT: Certainly. Well, I thought I read
18 here, it says, plaintiffs' motion for in camera inspection
19 of withheld documents by defendants Johnson & Johnson and
20 Ethicon, Inc., based on assertions of privilege, dated
21 December 12, 2014, and presently scheduled for hearing on
22 February 17, 2015.

23 UNIDENTIFIED SPEAKER: Yes, Judge, you're correct,
24 Your Honor, it has changed as of last Friday. I'm sorry, we
25 hadn't filed the supplemental paper. That's what the

1 purpose of this hearing in Texas was last Friday, to ask for
2 relief from that hearing date and from that filing date so
3 we could have the opportunity to speak with you.

4 And I think the soonest the hearing would be, in Texas,
5 would be the end of this month. It hasn't been scheduled
6 yet, and that's why we're meeting and conferring tomorrow.

7 THE COURT: I see. Okay. So that's why I -- I
8 just kind of rushed to have this phone call today, because I
9 thought you had a hearing on the 17th and I was trying to
10 figure out what was going on.

11 UNIDENTIFIED SPEAKER: We appreciate that.

12 THE COURT: Okay. Well, okay. Yes, well,
13 certainly, why don't you file whatever it is that you want
14 to file, and I will do whatever I can do to help. And
15 certainly -- I don't know, has Judge Molberg already
16 appointed a Special Master?

17 UNIDENTIFIED SPEAKER: No, Judge, he has not.

18 MR. MATTHEWS: Judge, this is David Matthews for
19 the plaintiffs. One of the issues in the case, obviously,
20 is the variance between states. And I think this is very
21 significant, although it would be nice to have simplicity
22 and similar rulings, there simply is a great deal of
23 difference between states. In particular, Texas discourages
24 special masters for privilege law issues. And, in fact, a
25 Dallas County, or Dallas District Judge had an issue with

1 that recently. So I think Judge Molberg would not appoint a
2 Special Master. But that brings up the issue of the
3 differences between states. And, you know, we do have a
4 trial setting upcoming in September. It was just recently
5 moved from April to September. So we -- we will be pushing
6 forward on issues concerning the Caviness production and
7 privilege as soon as possible.

8 THE COURT: Well, at least you do have some time
9 to work with. Well, all right.

10 MR. AYLSTOCK: Judge, this is Bryan Aylstock
11 again. I appreciate your comments. The only additional
12 thing I might have to add about the consistency point is I
13 know the New Jersey contingency and Judge Martinotti now is
14 certainly engaged in that, so if we're going to have that
15 effort, particularly given New Jersey law might be applying
16 at least to some states, might be good to loop them in as
17 well.

18 Mr. Slater is the co-lead liaison for that. So I just
19 wanted to point that out. I know Judge Goodwin indicated at
20 the hearing that he's already spoken to Judge Martinotti,
21 and I think both judges are hitting on all cylinders for the
22 upcoming trials now, which is probably what happened in the
23 hearing on New Jersey in Thursday.

24 THE COURT: Well, I guess what I'm going to do
25 then is I'm going to grant their motion for an order

1 directing the parties to coordinate the resolution of this
2 particular issue. And I'm not going to really say any more
3 than that at this point. We're going to have to figure out
4 what that means. I hate to issue orders that don't say
5 anything in black and white or don't -- I don't like
6 nebulous orders. I like my orders to be really clear and
7 tell you, you've got to do this, by this date, and it means
8 this.

9 But I do think that this is a huge issue that needs to
10 be resolved with input from the MDL, and as many other state
11 judges that currently have the issue in their radar, I would
12 think that the other judges that currently don't have it in
13 their radar will be happy if it's resolved by the time it
14 gets in their radar, because I don't know why anybody wants
15 to resolve these kinds of issues. I mean, I think most
16 judges would be happy to have had somebody else already do
17 the work, because -- you know, I don't think the judge
18 really cares one way or the other. They just want the right
19 answer, the fair answer. So --

20 MR. AYLSTOCK: Again this is Bryan Aylstock. You
21 know, I'm not exactly sure what that order would mean
22 either. I wouldn't want it to be interpreted by anybody on
23 this call to suggest that any state court judge can't do
24 something, or isn't -- it shouldn't -- I don't think we've
25 come anywhere near the legal requirements for an all writs

1 act type order. And I do think that Judge Goodwin and also
2 Judge Martinotti would say at the hearing that neither judge
3 is going, you know, try to see which judge can be more
4 deferential to the other, so just in the interest of
5 (inaudible) -- I would -- you know, I would want to make
6 that clear.

7 THE COURT: No, I'm not telling the judges they
8 have to do anything. I'm telling the parties that they have
9 to coordinate -- they have to work together to coordinate a
10 resolution. I'm not trying to tell the judges they have to
11 do anything, because, frankly, I can't tell the judges to do
12 anything. And even if I did, they wouldn't listen to me.
13 And they wouldn't have to.

14 I know where my place is in the whole scheme of things.
15 So, but, I do -- I can tell the parties in this MDL that
16 they need to coordinate this issue, and that's what my order
17 is going to say, they need to coordinate the issue, and we
18 need to get on this issue.

19 It sounds to me like the plaintiffs want it resolved.
20 It sounds like Ethicon wants it resolved. It sounds to me
21 like a big issue. And, like I said, frankly, it's one I
22 hadn't really thought of, but it could be any -- anywhere
23 from something fairly easy to an absolute chaotic nightmare.
24 So I think it needs attention sooner rather than later.

25 (Speaking over one another.)

1 MR. BERNARDO: Your Honor, this is Rich Bernardo.
2 We will try and do what we can to try and make it a simple
3 and streamlined process, and maybe starting with these
4 documents at issue may help guide the parties in terms of
5 other issues.

6 THE COURT: The first thing I want from Ethicon is
7 some kind of a motion filed. And I think the motion's got
8 to address the choice of law. And, I mean, I -- you know, I
9 think to me, I don't -- as I said and I think as Mr.
10 Aylstock followed up on, I'm not sure even that issue is
11 going to be the same from state to state. Hopefully it will
12 be, or there would at least be a majority of jurisdictions
13 that would agree that it's either done on a state-by-state
14 basis or it's going to all be governed by New Jersey law.
15 But that to me is the major issue.

16 I think from the standpoint of the MDL, the involvement
17 of the MDL in the actual reviewing of the documents is going
18 to depend a great deal on whether New Jersey law governs or
19 individual state law governs. Not to say that the MDL won't
20 still be involved, but I think that there will be a
21 difference in the level of involvement.

22 If that makes any sense. Does that make sense?

23 UNIDENTIFIED SPEAKER: It does, Your Honor, it
24 does and we will prepare a submission that addresses that
25 for you.

1 THE COURT: All right.

2 UNIDENTIFIED SPEAKER: I think it does, Your
3 Honor. David, do you want to say something?

4 MR. MATTHEWS: Yes. David Matthews, Judge. One
5 of the issues, and I brought this up initially, this case,
6 although we have filed -- my law firm has filed cases in the
7 MDL around the country, this is not our case. We have been
8 brought in to assist Mr. Blankenship, and, in all honesty,
9 I've not even met his client. This is an issue that really
10 is his issue. We will of course do our best, but I cannot
11 guarantee -- you know, I'm on the PFC, and I respect that,
12 but at the same time this is not our filed case.

13 So, you know, decisions that we made of course to best
14 protect his client and representing his client will be made
15 in the future, so that's really all I can say. So I just
16 wanted to alert the Court to that.

17 THE COURT: Well, of course, fortunately for you
18 the pleading that has been filed in the MDL is only filed as
19 it relates to all cases in the MDL. So there's no filing in
20 the MDL that applies to that Texas case. They've filed a
21 separate -- they filed the same pleading in the Texas case,
22 but the only pleading currently pending in the MDL, so the
23 only order that I can issue, and the only order that demands
24 that people do anything is filed in all, as it relates to
25 all MDL cases.

1 So the guy in Texas doesn't have to do anything.

2 MR. MATTHEWS: I understand.

3 THE COURT: Do you see what I am saying? So Mr.
4 Blankenship only has to do whatever Judge Molberg tells him
5 to do. He doesn't have to listen to me. He's not in the
6 MDL, is he?

7 MR. MATTHEWS: No, he's not.

8 THE COURT: Okay.

9 MR. AYLSTOCK: Your Honor, Bryan Aylstock again.
10 While I have the parties on the phone, there is one
11 coordination sort of related issue that has arisen from the
12 Perry trial in Bakersfield. And that is an issue with
13 regard to the authenticity or status of business records of
14 the ETH.MESH documents, the documents produced by Ethicon
15 from their files. Distinguish that from the issue of
16 foundation, which I know having spent many hours with you,
17 is, is important that a witness, at least a noncorporate
18 witness or noncorporate representative may have seen the
19 document or had some reason to have seen it.

20 But in Bellew, we have 200 -- we cut our lists way down
21 and we've got about 275 ETH.MESH documents. And what I'm
22 trying to get a handle on is for those where Your Honor
23 hasn't already ruled on them on the admissibility on the
24 context of the depo designations. If I could get them --
25 them being Butler Snow, or J & J to tell me of those

1 remaining documents which are not -- which they will not
2 stipulate to authenticity or status of business records,
3 that would help us going into this trial. And we've had a
4 lot of E-mails going back and forth, but given the limited
5 number, you know, I would hope that we could do that.

6 I know we do have a hearing. I just wanted to
7 highlight with your Your Honor, I just wanted to highlight
8 that as a potential issue that may come up if we can't get
9 an agreement that they will at least let us know which
10 ETH.MESH documents they claim are not authentic or business
11 records. That happened in the Bakersfield case.

12 THE COURT: Right. So that needs to be done. I
13 mean there's -- you know, at least you can tell each other
14 what you're willing to stipulate to and what you're willing
15 not to stipulate to. And I'm not saying you have to
16 stipulate to anything, but you can at least tell each other
17 what you're willing to do and not do. And that should be
18 done before you come here on the 25th. For everything,
19 everything that's out there, you should know by the 25th.

20 MR. AYLSTOCK: And I suggested if they're not
21 going to stipulate to authenticity or business records, we
22 may need a deposition. Obviously, the hearing is very
23 close, so if we could just get over that issue. Again, I'm
24 not talking about whether a document is admissible or
25 whether it can be used with this witness or that witness,

1 simply whether the document is what it purports to be and
2 came from the business records of Ethicon in the ordinary
3 course of business. That's all I'm asking for an agreement
4 on.

5 MR. BERNARDO: Judge Eifert, this is Rich
6 Bernardo. I apologize. I'm not the person who has been
7 involved in that, although I have been copied and seen some
8 of the communications, and I'm not clear what Mr. Aylstock
9 is asking for. I don't think he's asking for a stipulation
10 as to 20 millions of pages of documents that have been
11 produced, but I will say I know that Ms. Jones has been
12 communicating with him as recently as yesterday and they
13 continue to communicate. And I would suggest that they do
14 that, and if there's not some agreements that they reach,
15 that they can come back to address it, because I'm not in a
16 position to address whether or not what Mr. Aylstock is
17 asking for is appropriate or not, and I know there have been
18 other communications on this as recently as today.

19 MR. AYLSTOCK: It's simply the 278 ETH.MESH
20 documents -- (inaudible) -- all are cut down and --
21 (inaudible.) I just don't want to be caught at trial --

22 MR. BERNARDO: Sure, I understand, Bryan.

23 This is Rich Bernardo again. And I know we'll work
24 with you. I'm simply saying I'm not in a position to chime
25 in as to what our position is on those 278 documents,

1 because I've just not been involved in that specific issue.

2 THE COURT: Right. And I don't expect you to do
3 it right now on the telephone. I'm just saying, by the
4 25th, everybody ought to know what they're willing to do,
5 what the other side is willing to stipulate to and what
6 they're not willing to stipulate to. Because that's not a
7 big issue. It's not a big deal. You've had plenty of time
8 to do it.

9 How many days is Judge Goodwin giving you for trial
10 this time around?

11 MR. AYLSTOCK: Seven trial days, three and a half
12 per side, Your Honor. So we have a very quick trial.

13 THE COURT: It's going to be a quick trial. And
14 you're really not going to put 278 documents in, but -- I
15 would say it may only be a handful of documents, it should
16 be pretty easy to know what you're going to stipulate to and
17 not to. But even if it is 200, you ought to be able to do
18 that by the 25th, so -- so why don't you get guys get that
19 done so when you come we're all ready to go?

20 MR. AYLSTOCK: Yes, Your Honor.

21 UNIDENTIFIED SPEAKER: We'll work it out, yes,
22 Your Honor. Thank you.

23 THE COURT: Very good. All right. Is there
24 anything else then?

25 UNIDENTIFIED SPEAKER: Nothing from defendants,

1 Your Honor.

2 THE COURT: All right. Well, then we will wait
3 for Ethicon to make its motion. And then at that point, I
4 don't believe we need any expedited briefing schedule,
5 because once you make your motion, the plaintiffs will have
6 17 days to respond. And then you'll have ten days after
7 that. And we can look at it at that point. And maybe you
8 can also be in that period of time trying to figure out
9 what -- what else might be going on out there that would be
10 related to this issue. Okay?

11 UNIDENTIFIED SPEAKER: We'll do that, Your Honor.
12 We appreciate your guidance on the issue. Thank you.

13 MR. AYLSTOCK: Thank you, Judge.

14 THE COURT: Thank you.

15 UNIDENTIFIED SPEAKER: Thank you, Judge.

16 THE COURT: Thank you. Bye-bye.

17 (Proceedings concluded at 2:57 p.m.)
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1 CERTIFICATE OF OFFICIAL REPORTER

2 I, Catherine L. Schutte-Stant, Federal Official
3 Court Reporter, in and for the United States District Court,
4 for the Southern District of West Virginia, do hereby
5 certify that the foregoing is a true and correct transcript
6 of the stenographically reported proceedings held in the
7 above-entitled matter.

8
9 Dated February 13, 2015.

10
11 /s/ CATHERINE L. SCHUTTE-STANT, RMR, CRR

12 _____
13 CATHERINE L. SCHUTTE-STANT, RMR, CRR
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